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January 25, 1993

VIA FEDERAL EXPRESS

Ms. Donna Searcy
Secretaries Office
FEDERAL COMMUNICATIONS COMMISSION
Room 222
1919 "M" Street N.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation
FCC File No. 92-544
MM Docket 92-266

Dear Sir or Madam:

Enclosed for filing with the Federal Communications Commission, please find the original and nine copies of Comments in connection with the above-referenced matter. If you have any questions, do not hesitate to contact me.

Very truly yours,

BERNICK AND LIFSON, P.A.

Rose Renner for
Thomas D. Creighton
Thomas D. Creighton

TDC/rkr
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92-544

In the Matter of:	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

TO: The Commission

COMMENTS OF THE BELOW-NAMED POLITICAL SUBDIVISIONS OF THE STATE OF MINNESOTA

The following political subdivisions of the State of Minnesota submit these comments in the above-captioned proceeding. All such jurisdictions are collectively referred to herein as "Cities".

North Suburban Cable Communications Commission	Representing the Minnesota Cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Moundsview, New Brighton, North Oaks, Roseville, St. Anthony, and Shoreview.
The Burnsville/Eagan Cable Communications Commission	Representing the Minnesota Cities of Burnsville and Eagan.
The Quad Cities Cable Communications Commission	Representing the Minnesota Cities of Anoka, Champlin, Ramsey, and Andover.
The North Central Suburban Cable Communications Commission	Representing the Minnesota Cities of Blaine, Centerville, Circle Pines, Coon Rapids, Ham Lake, Lexington, Lino Lakes, and Spring Lake Park.
The Columbia Heights/Hilltop Cable Communications Commission	Representing the Minnesota Cities of Columbia Heights and Hilltop.

The Lake Minnetonka Cable Communications Commission

Representing the Minnesota Cities of Deephaven, Excelsior, Greenwood, Long Lake, Medina, Minnetonka Beach, Minnetrista, Orono, St. Bonifacius, Shorewood, Spring Park, Tonka Bay, Victoria, and Woodland.

INTRODUCTION/SUMMARY

Congress has acted through the Cable Television Consumer Protection and Competition Act of 1992 to recognize that the monopoly profits of cable operators must be curtailed by affording the opportunity for local franchising authorities to regulate rates for basic cable television service and, where unreasonable, rates for other tiers of cable television service. Congress emphasized the reining in of monopoly profits through the establishment of local rate regulatory authorities sensitive to local criteria which would exist if cable operators were subject to competition. The Cities believe that the FCC's notice, while moving generally in some appropriate directions, at certain junctures ignores both fundamental principles of local economics and Congress' concern that the rate regulatory structure be adopted to benefit subscribers not cable operators.

The Cities disagree with the FCC's fundamental approach in the establishment of benchmark rates pursuant to standards which would institutionalize existing monopoly-based cable rates through the averaging of current cable rates which were not developed in a competitive environment.

Therefore, the Cities urge the abandonment of the benchmark standard and the application of a cost-of-service analysis made available to local franchising authorities in their exercise of their federally granted local rate regulatory authority.

In the alternative, Cities accept the FCC's suggestion that cost-of-service regulatory authority be standardized by the FCC's adoption of guidelines and standards for such local exercise of authority. Such guidelines, as suggested by the FCC, could include a reasonable recovery of direct costs of the channels in the basic tier less advertising revenues or other benefits derived therefrom, with a nominal amount of joint and common costs of the system as a whole.

Should the FCC persist in its benchmark approach, such benchmarks may not be established by review of existing cable rates, but by a preliminary cost-of-service analysis of the delivery of basic service applying a hypothetical competitive model to cable service rates from the inception of delivery of cable service in a franchise area. Any application of benchmark standards derived from existing cable rates would ignore the concern of Congress to break down the monopoly-based explosion of cable rates which has occurred since the inopportune deregulation of certain rates since January 1, 1987 through the 1984 Cable Act.

In its development of rate regulation standards, the FCC must allow a cost-of-service process or develop a benchmark rate based on a "what would have been" had effective competition existed in the past. Congress required nothing less of the FCC. Congress required that the FCC's regulations meet a dual test, (i) "ensure that the rates for basic service are reasonable" and (ii) "be designed to ... protect subscribers ... from rates ... that exceed the rates that would be charged ... if such cable system were subject to effective competition." Section 623(b)(1). Effect must be given to both (i) and (ii). Thus, any regulations which are adopted must ensure reasonable rates, not to exceed

rates which would have existed had there been effective competition since the end of 1986.

By establishing a cost-of-service standard or a severely restricted, system-specific benchmark, the FCC must not only consider what rates would be if the market was now competitive, but must consider what rates would have been if the market had been competitive. Any other regulatory approach does not comply with (ii) above of the statute. Congress clearly intended that the FCC view what rates would have been if the market had been competitive in the past. Section 623(b) requires that basic rates in excess of competitive rates be rolled back where they exist. If the FCC regulations permit the continuation of excessive rates by establishing a benchmark based on the status quo, ignoring Congressional intent to roll back, the regulations would not accord with the statutory requirement designed to protect subscribers from monopoly-based rate influences.

PROPOSED IMPLEMENTATION

I. General Issues.

The FCC solicits general comments regarding whether the purpose and terms of the Cable Act embody a Congressional intent that [the] rules produce rates generally lower than those in effect when the Cable Act of 1992 was enacted ... or, rather, Congressional intent that regulatory standards serve primarily as a check on prospective rate increases. The Cities believe that the Congressional intent is clear that effective competition is the overriding concern of Congress. To only develop rules applicable to prospective rate increases would create a system institutionalizing existing cable rates

which were created in a non-competitive environment. The rules must establish a reasonable analysis of the cost of delivery of service, recognizing the intent of Congress to be reasonable, first, to the cable subscriber. Therefore, a scheme for the rollback of basic rates must be established. A cost-of-service analysis is the most applicable in this endeavor. If a benchmark is established, it cannot be based on existing non-competitively arrived at rates. A benchmark must be established based on a preceding cost-of-service analysis assuming a competitive market had existed in the cable industry.

II. Basic Cable Service Regulation.

A. Components of the Basic Service Tier Subject to Regulation.

1. The Cities agree with the FCC's tentative conclusion that:

   a. An operator may include additional services in a basic service tier. The basic service requirements specified in the Act are identified as a minimum.

   b. The Act only prohibits requiring the purchase of non-basic tiers as a prerequisite to obtain programming offered on a per-channel or per-program basis, and nothing requires the subscriber to purchase basic service to obtain non-video or institutional network offerings.

2. The Cities disagree with the FCC's suggestion that an operator may offer only one tier of basic service as a result of the buy-through prohibition of the 1992 Act. The statutory definition of basic service as any tier of service that includes the retransmission

of local television broadcast signals remains in effect. Any other conclusion would allow the operator to re-tier its system to avoid the Congressional intent to provide for regulation of basic cable service. The Cities believe that the marketing of a service remains crucial to determine whether or not it is part of basic service and that the new Act does not override American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987).

B. Regulation of the Basic Service Tier by Local Franchising Authorities and the Commission.

1. The Cities agree with the FCC's tentative conclusions that:

a. Certified local franchising authorities may regulate rates for basic cable service unless the certification is disallowed or revoked.

b. The FCC should regulate rates for basic cable service if a franchising authority submits a certification stating that it cannot meet the certification standards or if a franchising authority objects to rates but does not have the resources available to it to assert jurisdiction. The Cities believe that the FCC should exercise jurisdiction even in areas where the Commission has denied a certification request if the FCC receives a complaint of rate unreasonableness from a franchising authority. Cable subscribers which complain about rates should, in the Cities' opinion, approach a

franchising authority first and not have the right of appeal directly to the FCC should the local franchising authority choose not to proceed further with the subscriber's objection.

c. A franchising authority need submit only a standardized and simple form for certification purposes.

d. The FCC should base its finding of effective competition initially on the determination by a franchising authority that effective competition does not exist in its franchise area. However, the franchising authority should be required to submit documentation to the FCC only upon a challenge to its finding by the cable operator.

e. The determination of whether effective competition exists should be made franchise area by franchise area.

f. If more than one cable system is authorized to operate in a franchise area, the requisite effective competition analysis must be applied to each cable system.

g. Two or more franchise authorities may (but need not) file a joint certification and exercise joint regulatory authority. In Minnesota, many cities regulate cable franchises pursuant to a Joint Powers Agreement. The Joint Powers Commissions established pursuant to the Joint Powers

Agreements are often the regulatory authorities for a number of municipalities. The FCC should permit Joint Powers Commissions the authority to apply for and receive certification on behalf of their member cities.

h. The FCC should base its decision of certification solely on the filings submitted by the franchising authority.

i. A party seeking revocation of certification or other relief against a franchising authority must serve a copy of the petition on the franchising authority, and the franchising authority may file an opposition to the petition. The FCC's revocation of certification is appropriate only where local authorities clearly violate the FCC's basic requirements for rate regulations. Lesser remedies should apply in situations where franchising authorities inconsistently apply FCC standards or otherwise depart from the terms of the certification. Such procedures as notice, pleadings, and suspension of certification for a period of time, are all appropriate procedures.

j. FCC rules should preempt inconsistent state and local laws. However, franchising authorities should be allowed to establish rate regulations that are "consistent with," but not necessarily identical to, federal rate regulations. The

imposition by local franchising authorities of additional requirements or the consideration of additional factors not specifically required by FCC regulations should be permitted as long as those additions are not directly in conflict with FCC regulations.

2. In addition, the Cities urge the FCC to make clear that:

   a. The Act gives authority to franchise authorities, independent of state or local laws, to regulate rates.

   b. A cable operator must challenge a finding of no effective competition prior to the FCC's approval of a certification request. Anything less than this procedure would raise an obvious cable operator delay tactic during the actual rate regulation proceedings. A certification should be in effect unless and until revoked.

   c. A cable operator should be responsible for petitioning a franchising authority if the cable operator believes that it has become subject to effective competition. However, the franchising authority should not be required to submit its findings to the FCC. If such a petition is denied by a franchising authority, the cable operator should be given the authority to appeal to the FCC, but the franchising authority should not be required to simply file papers with

the FCC if no such challenge, or appeal, is made by the cable operator.

d. The FCC should abandon the dichotomy of its proposal to apply effective competition standards on a franchise area basis for basic rates and on a system-wide basis for non-basic programming services. Effective competition is effective competition and should be measured on a franchise area basis always, not on a system-wide basis in some circumstances.

C. Regulations Governing Rates of the Basic Service Tier.

1. The Cities believe, as explained in the introduction, that the cost-of-service approach to rate regulation is the most effective way to ensure the Congressional intent to provide competition-based reasonable rates for the delivery of cable service. Congress clearly intended to allow for the regulation of basic rates at the local franchising authority level. Benchmarking would preempt local authority by creating a pre-decision at the federal level regarding "reasonableness." The costs for the delivery of cable service vary widely throughout the United States. Benchmarks applied to the delivery of cable service would be unreasonable both to the subscriber and to the cable operator. The competitive element as well as the cost of delivery of cable service in, for

example, New York City as opposed to Anoka, Minnesota, are simply not comparable. The factors for a cost-of-service could well be standardized by the FCC, but a benchmark rate establishment would be ludicrous. Such an analogy, extended, would require the Hilton Hotel on Times Square to charge the same room rate as the Motel 6 in Anoka, Minnesota. Cable systems and their costs of delivery of services vary as widely geographically as any other service provider.

2. The establishment of a benchmark based on current rates would merely institutionalize the monopolistic pricing of cable operators. The Cable Act states clearly that eight years of monopolistic pricing have produced rate escalation unacceptable to federal policymakers. If a benchmark approach is established, even attempting to analogize similarly situated systems, the FCC must establish such benchmarks by analyzing the preceding eight years of non-competitive rate escalation through the lens of a cost-of-service analysis.

3. Should some form of benchmark analysis prevail, the Cities disagree with the FCC's tentative conclusions that:

   a. Rates not "significantly" above the benchmark will be presumed reasonable. Instead, a rate exceeding a benchmark to any extent should be presumed unreasonable.

b. Costs may be ignored if a benchmark is used. To the contrary, the Act expressly requires that certain costs be considered in determining whether rates are reasonable.

4. Should some form of benchmark analysis be required, the Cities urge the FCC to separate cable systems into distinct classes based on specified variables and then define a benchmark for each class of system. [The Cities believe that such an approach is merely a modified cost-of-service approach. Therefore, a benchmark should not be used and instead franchise authorities should be allowed to regulate based on cost-of-service.] However, if the FCC insists on benchmarks, such benchmarks should only apply to similarly situated systems. Such factors could include homes passed per mile, number of subscribers, number of channels, system age, construction variables in systems such as underground cable and terrain crossed, programming costs, staffing levels, and other overhead considerations. Franchise obligations and franchise fees may be considered, but not in isolation. They should only be viewed as any other overhead requirement. The FCC should beware of multi-tiered ownership structures which provide for internally generated and paid expenses, such as management fees and equipment leasing, which may not be market driven and should not be considered as overhead components unless they are

devalued to equate with comparable services in the competitive market.

5. If the FCC insists on a benchmark standard, it must afford franchise authorities the opportunity to rebut the presumption that below-benchmark rates are reasonable. If an operator is entitled to use a cost-of-service method to show that above-benchmark rates are justified, the franchising authority must likewise be given the opportunity to demonstrate that below-benchmark rates are required in a particular instance. Moreover, the operator must be required to provide the franchising authority the information necessary to make such a showing.

6. If a benchmark approach is adopted, the benchmark must be system-specific and not average-price-based. In other words, the benchmark would not be a final price of basic service for similarly situated basic service, but would in fact specify cost-of-service factors which must be considered in any local situation for the establishment of benchmarks.

7. The Cities urge the FCC to establish a process by which a franchising authority can appeal any benchmark restriction placed upon it by the FCC.

8. The Cities support the FCC offered alternative to pure cost-based approach or a benchmark approach. The Cities support the

concept that the FCC should prescribe guidelines for basic service regulation by which a local franchising authority could use an individual cable system's costs to define reasonable rates that allowed recovery for at least the direct costs of the channels in the basic tier, but no more than these costs, and a nominal amount of the joint and common costs of the cable system as a whole.

9. The Cities believe that while certain price cap alternatives might reduce government expense of regulation, a cable operator should only be allowed to pass through obvious and readily identifiable price increases if the cable operator is also required to reduce rates as a result of cost decreases.

D. Regulation of Rates for Equipment.

1. The Cities agree with the FCC's tentative conclusions that:

a. Congress intended to separate rates for equipment and installations from other basic rates, provided such rates are also reasonable.

b. Rates for equipment and installation must be based on actual cost.

c. Rates for installation should not be bundled with rates for leasing equipment.

d. Rates for equipment used to receive the basic tier or installation rates required for the basic tier should be

subject to "reasonable" basic rate regulation. Additionally, regulation should be triggered for any piece of equipment or installation which "touches" the basic service tier. Stated another way, just because a piece of equipment or installation also is necessary for other-than-basic service tiers, as long as it "touches" the basic service tier, it would be subject to "reasonable" regulation wherever else it is used in the system.

e. The Cities believe that a cable operator should recover reasonable costs for providing cable equipment and installation in any rate regulatory scheme.

f. The Cities believe that cable operators must be allowed to offer free or reduced-rate installation as a promotional tool, provided, however, that the cost of such free or reduced rate installation may not be charged back as a loss or overhead cost applicable to the basic rates of other subscribers.

2. Costs of Franchise Requirements.

a. The Cities agree with the FCC's tentative conclusion that franchise costs would include any direct cost of providing any services required under the franchise directly attribut-

able to PEG channels and a reasonable allocation of overhead directly attributable to PEG channels.

b. The Cities do not agree that the cost of franchise requirements should include a sum for per channel costs for the number of channels used to meet franchise requirements for PEG channels. Both Cities and the cable operator benefit from the provision of PEG channels, albeit impossible to allocate such benefit. Additionally, a cable operator should not be able to claim costs for PEG channels unless the FCC's rate regulatory standards reflect benefits received from commercial cable channels such as advertising revenues through the provision of ESPN or CNN. Finally, if any allocation is made for costs of PEG channels, a cable operator must be required to show that absent the allocation for PEG, the channel would have been used for a commercial purpose (i.e., there are no vacant channels on the system and, e.g., the Comedy Channel could be added with the generation of identifiable and justified revenues).

E. Customer Charges.

1. The Cities agree with the FCC's tentative conclusions that:

a. Such charges must be based on reasonable costs.

b. The regulations adopted should apply to any changes in the level of service tiers that are initiated at the subscriber's request after installation of initial service.

c. The charges for changing the level of service should not exceed a reasonable, nominal amount when such changes are done by computer or other simple method.

F. Implementation and Enforcement.

1. The Cities agree with the FCC's tentative conclusions that:

a. Any rate increase, even those based on factors outside a cable operator's control, would trigger regulatory review, notice requirements, and procedural time frames. Such regulatory review would apply to an operator's initial filing and any subsequent proposed new rates.

b. A cable operator must notify subscribers of a proposed rate increase at the same time that it notifies the franchising authority. If local franchises have rate notification deadlines (the Cities herein require 90 days notice), those time lines, if reasonable, would prevail. The cable operator's notification to cable subscribers must include information regarding how to contact the regulatory authority and notification of regular meeting dates of the franchising

authority, if such meeting dates are known to the cable operator.

c. Any interested party may participate in the rate making procedure; however, formal rate hearings are not required.

d. Franchising authorities may require the operator to provide additional information, including proprietary information, pursuant to rules established by the FCC or local franchises.

e. Enforcement of regulatory decisions must occur at the local level.

f. The local franchising authority should issue written explanation of its decision; however, such explanation should not be required to be at the level of findings of fact and conclusions of law in the nature of those required in administrative proceedings.

g. A cable operator should bear the burden of proof for demonstrating that its rates comply with the FCC's regulations.

h. A cable operator must notify subscribers of the availability of basic service in any sales information distributed prior to installation and hook-up and at the time of installation.

2. The Cities urge the FCC to require that:

a. Upon a determination that a rate is not reasonable, the local franchising authority should not be required to establish a "reasonable rate;" however, the cable operator has the right to resubmit a different rate and be subjected to subsequent additional rate proceedings.

b. The franchising authority has the power to order rebates and should not be required to obtain an order from the court or other governmental entity in order to order refunds. Cable operators may be subject to existing franchise penalties, including revocation and non-renewal, for failure to comply with rate regulatory determinations of the local authority. The FCC should resolve disputes between the local authority and a cable operator over a rate decision.

III. REGULATION OF CABLE PROGRAMMING SERVICES.

A. Regulations Governing Rates.

1. The Cities concur with the FCC's tentative conclusion that the statute intends for the FCC to establish criteria to govern the determination in an individual case of whether rates for cable programming service are unreasonable based on a reasoned balancing of the factors enumerated in the statute and other factors that the Commission in its discretion may choose to consider.

2. The Cities would urge the FCC to afford primary or greater weight to certain factors enumerated in the statute including:

   a. Rates for similarly situated systems taking into account similarities and costs and other relevant factors;

   b. Rates of systems subject to effective competition; and

   c. The history of rates for the system, including their relationship to changes in general consumer prices.

3. The Cities would urge de-emphasis of the systems' rates as a whole for all cable services, and would recommend emphasis on capital and operating costs of the system and advertising revenues only if they are considered in relationship to all costs and other revenues of the system. The FCC's consideration of other additional revenues is extremely important as the cable systems expand and develop into delivery of other telecommunications services via its cable systems.

4. The Cities agree with the FCC's tentative conclusion that the advantages and disadvantages of various approaches suggested for regulation of basic service rates apply as well to non-basic service rate regulation.

5. The Cities, therefore, reassert their rejection of the benchmark analysis as it relates to non-basic service rates, reasserting the

same arguments utilized in the Cities' rejection of the benchmark analysis in basic service rates.

6. The Cities disagree with the FCC's tentative conclusion that a non-cost-based approach will best serve the intent of Congress.

7. The Cities urge the FCC not to permit higher rates for non-basic service rates in order to permit relatively low basic service rates. Assuming that basic service rate regulation will produce "reasonable" rates, rates for non-basic service need not be escalated to make basic rates more "reasonable," and should, instead, be held to their own reasonableness standard.

8. The Cities propose the following procedure for the handling of complaints regarding non-basic service:

   a. Subscribers' complaints should first be filed with the franchising authority. Such complaint would be reviewed by the franchising authority. If the complaint is found to have merit, the franchising authority will conduct a rate hearing on the complaint.

   b. The standard of review for handling complaints from subscribers should be the unreasonableness of the rate in light of a cost-of-service analysis.

   c. The franchising authority may initiate reasonableness rate hearings. The cable operator would then respond to the

franchising authority, a determination would be made, and would be effective subject to a reasonable appeal procedure for the cable operator to the FCC.

d. Both subscribers and franchise authorities would be required to file a complaint about a rate increase no later than 60 days after it is in effect.

e. Due process rights would be preserved so long as notice of the complaint was issued, a reasonable period for response ensued, and an opportunity existed to be heard before the decision-making franchise authority. Appeal of the franchise authority's decision to the FCC could be made both on procedure and substance.

f. The FCC should be able to establish a rate, once a rate is deemed unreasonable.

g. The franchising authority should establish refund procedures on a case-by-case basis.

h. The cable operator should be subject to franchise remedies, including revocation or denial of renewal should the cable operator fail to comply with the rate decision.

i. A subscriber should be permitted to appeal directly to the FCC any determination by a franchising authority that the subscriber's complaint is without merit.

j. The Cities agree with the FCC's tentative conclusion that the cable operator has the burden of refuting a complaint that has satisfied the minimum necessary showing that a non-basic service rate is unreasonable.

k. The Cities agree with the FCC's tentative conclusion that rates for the entire class of subscribers will be reduced where the rate was unreasonable, even where a single subscriber filed a complaint.

IV. PROVISIONS APPLICABLE TO CABLE SERVICE GENERALLY.

A. Geographically Uniform Rate.

The Cities urge the Commission to define the term "geographical area" to mean the area that a cable system serves, not only the franchise area.

B. Discrimination.

No comment.

C. Negative Option Billing.

1. The Cities agree with the FCC's tentative conclusion that:

a. In order to be billed for a cable service, a subscriber must have affirmatively requested that particular service or equipment. Silence or inaction by a subscriber may not be viewed by a cable operator as an affirmative request for service. An affirmative request for service or equipment

may occur orally or in writing so that subscribers are given flexibility to order by either method.

b. An operator should not be permitted to charge for any service or equipment provided in violation of the Act and implementing rules.

2. The Cities urge the FCC to recognize that:

a. Subscribers must receive advance notice at least ninety (90) days before any tiering changes, including any instance where an operator adds services or equipment and imposes a corresponding rate increase, and any instance where programming services or equipment are eliminated. Absent advance notice, implementing these alternatives might otherwise constitute a negative option and, in any event, might provide a basis for a complaint if the new rate is unreasonable in light of the change.

b. Cable operators may attempt to retier services as a way to avoid or minimize the impact of rate regulation. As Congress recognized, the manner in which a service is marketed and priced remain determinative factors in deciding what is included as part of a service and whether that service is subject to regulation.